| **Berkshire Hathaway Specialty Ins. Co. v H.I.G. Capital, LLC** |
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| 2020 NY Slip Op 31674(U) |
| May 27, 2020 |
| Supreme Court, New York County |
| Docket Number: 652750/2017 |
| Judge: Andrew Borrok |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ANDREW BORROK **PART** IAS MOTION 53EFM

*Justice*

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BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, EXECUTIVE RISK INDEMNITY INC., STARR INDEMNITY & LIABILITY COMPANY

Plaintiff,

- v -

H.I.G. CAPITAL, LLC,

Defendant.

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**INDEX NO.** 652750/2017

**MOTION DATE** 05/12/2020

**MOTION SEQ. NO.** 012 013

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 012) 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 367, 369, 370, 371

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 374, 375, 376, 377, 378, 379, 380, 381, 386, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 404, 405, 406, 407, 408, 409

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and for the reasons set forth below, (i) H.I.G. Capital, LLC's (**HIG**) motion (Mtn. Seq. No. 012) for leave to file an amended answer to the First Amended Complaint and Counterclaims pursuant to CPLR § 3025 is denied, and (ii) Starr Indemnity & Liability Company's (**Starr**) motion (Mtn. Seq. No. 013) to compel HIG to produce documents responsive to Starr's Second Notice of Discovery and Inspection is granted in part. Capitalized terms used but not otherwise defined herein shall have the meaning ascribed thereto in the court's 2019 Decision (hereinafter defined).

## I. The Relevant Facts and Circumstances

This is a declaratory judgment action brought by Berkshire Hathaway Specialty Insurance Company (**Berkshire**), Zurich American Insurance Company (**Zurich**), Executive Risk Indemnity Inc. (**Executive**, and together with Berkshire, Zurich, and Starr, collectively, the **Insurers**) against HIG. The Insurers seek a declaratory judgment regarding the parties' rights and obligations, if any, under a program of claims-made primary and follow-form excess professional liability insurance policies issued by the Insurers to HIG for the period May 31, 2016 to May 31, 2017, with respect to a certain proceeding in the United Kingdom brought by the United Kingdom's Pensions Regulator (the **UK Pensions Regulator**). The UK Pensions Regulator seeks to impose liability on HIG and its affiliates in connection with HIG's acquisition of Silentnight Group Limited (**Silentnight**) in May 2011, alleging that HIG and its affiliates improperly separated Silentnight's Pension Scheme, which was facing a large deficit, from its operating business, which hampered its ability to meet its pension obligations and will likely result in its entry in the UK's Pension Protection Fund. The UK Pensions Regulator seeks to recover the total pension deficit at the time of the acquisition.

The Insurers filed the First Amended Complaint on May 21, 2017 seeking, *inter alia*, a declaration that an express exclusion set forth in a certain Warranty Letter barred coverage for the UK Pensions Regulator matter. HIG filed an answer on May 28, 2017 and asserted counterclaims seeking, among other relief, a declaration that the Warranty Letter does not preclude coverage. HIG moved for partial summary judgment in its favor, arguing that (i) Florida law governs the claims in this action, (ii) Berkshire is required to advance defense costs, and (iii) the Warranty Letter does not apply because it is ambiguous. The Insurers cross-moved

for partial summary judgment, seeking a declaration that the 2016 insurance policies provide no coverage for the UK Pensions Regulator matter.

By decision and order, entered April 12, 2018, the court (Ramos, J.) granted the Insurers' cross-motion and denied HIG's motion, holding that (i) the UK Pensions Regulator's 2014 and 2016 Warning Notices constitute a single claim first made prior to the inception of the 2016 policies, and therefore do not afford coverage for the 2016 Warning Notice, including a duty to advance defense costs, and (ii) the 2016 policies' Prior Notice Exclusion bars coverage for all losses incurred in connection with the 2016 Warning Notice, including any duty to advance defense costs. Subsequently, HIG moved to reargue the motion for partial summary judgment and requested that the court determine whether Florida or New York law applies to the coverage dispute. The court accepted additional briefing and, by Decision and Order entered September 18, 2018, the court denied the motion to reargue and held that New York law applies to the remaining claims. HIG appealed both orders, and the First Department affirmed except to the extent that Florida law, rather than New York law, governs the remaining claims (*Berkshire Hathaway Specialty Ins. Co. v H.I.G. Capital, LLC*, 172 AD3d 570, 570 [1st Dept 2019]).

The Insurers then moved to dismiss HIG's first counterclaim in part and to dismiss HIG's first (laches), second (waiver), third (ambiguity of Warranty Letter), fourth (ambiguity of Warranty Letter), fifth (waiver), and tenth (estoppel) affirmative defenses. By decision and order (the **2019 Decision**; NYSCEF Doc. No. 351), entered October 1, 2019, the court granted the Insurers' motion and dismissed HIG's first counterclaim to the extent that it sought a declaration that the Warranty Letter is ambiguous or that Starr waived its right to deny coverage or is otherwise

estopped from denying coverage under the 2014 policy, and dismissed that potion of the first counterclaim seeking a declaration that Starr unreasonably withheld consent to settle, and dismissed HIG's first, second, third, fourth, fifth, and tenth affirmative defenses in their entirety. In the 2019 Decision, with respect to the waiver and estoppel affirmative defenses, the court held:

> For its First Affirmative Defense, HIG alleges that "Starr is barred from denying coverage as to the 2014 Warning Notice based on the doctrine of laches because of its unreasonable delay that prejudiced HIG" (Answer, ¶ 94). Under Florida law, insurance coverage cannot be created or extended by estoppel (*Crown Life Ins. Co. v McBride*, 517 So 2d 660, 661 [FL Sup Ct 1987]). As the Florida Supreme Court observed
>
> > [t]he general rule in applying equitable estoppel to insurance contracts provides that estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not affirmatively to create or extend coverage (*id.*).
>
> Therefore, HIG cannot rely on its defense of laches to create coverage where no coverage is afforded. Accordingly, the motion to dismiss HIG's First Affirmative Defense is granted.
>
> For its Second Affirmative Defense, HIG alleges that Starr waived the ability to rely on the Warranty Letter (i) by accepting HIG's loss runs in response to question (a) in the Warranty Letter, (ii) by underwriting the risk in issuing the 2016 Starr Policy without a specific matter exclusion with knowledge of the 2014 Warning Notice, and (iii) by failing to timely deny coverage based on the Warranty Letter (*id.*, ¶ 95). HIG also alleges in its Fifth Affirmative Defense that Starr waived the ability to argue that any alleged misrepresentations were material by underwriting the risk with actual knowledge of the facts concerning the Regulator's investigation (*id.*, ¶ 98). For its Tenth Affirmative Defense, HIG alleges that "Starr is estopped from claiming . . . that coverage is barred for the 2016 Warning Notice or the 2014 Warning Notice based on any alleged misrepresentations in the [Warranty Letter] because it intentionally and knowingly underwrote the risk in 2015 and 2016 without a specific subject matter exclusion" (*id.*, ¶ 103).
>
> As the court has held, and the Appellate Division has affirmed, "the 2014 Warning Notice and the 2016 Warning Notice constitute a single Claim first made before the 2016 [Primary Policy and 2016 excess policies'] inception." It is undisputed that HIG tendered the 2014 Warning Notice to Starr during the 2014 Starr Policy period. Because the 2014 Starr Policy and the 2016 Starr policy are

> claims-made policies, they provide coverage only for claims made and reported during the applicable policy period (Pl.'s Mem. in Support, at 17-18). Accordingly, the 2014 Warning Notice would be covered, if at all, under the 2014 Starr policy. HIG's Second, Fifth, and Tenth Affirmative Defense are therefore without merit, as Starr's knowledge of the 2014 Warning Notice prior to the issuance of the 2016 Starr Policy is irrelevant to the issue of whether the 2014 Starr Policy affords coverage for the 2014 Warning Notice, and Starr's decision to underwrite the risk in 2015 and 2016 without a specific subject matter exclusion is likewise irrelevant as they relate to different policy periods.

(*Berkshire Hathaway Specialty Ins. Co. v H.I.G. Capital, LLC*, Sup Ct, NY County, Oct. 1, 2019, index No. 652750/2017).

In its proposed First Amended Answer, HIG seeks to again add as a "new" fifteenth affirmative defense, waiver, stating:

> Starr waived its ability to rely on the Warranty and Representation Letter to deny coverage. When Starr underwrote the Policy and risk of what it now alleges was a misrepresentation, Starr expressly, voluntarily, knowingly, and intentionally "Waived," in writing, any reliance on the "Application Warranty," "Application," and "Reliance Conditions."

Significantly, the proposed First Amended Answer also continues to include as its eighth and ninth affirmative defenses the following:

> **AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE (AS TO ALL PLAINTIFFS)**
>
> 97. The Related Claims provision on which Plaintiffs rely to deny coverage for the 2016 Warning Notice does not apply because the 2016 Warning Notice and 2014 Warning Notice arise out of separate and unrelated Wrongful Acts that gave rise to separate regulatory actions based on separate acts seeking separate relief.
>
> **AS AND FOR A NINTH AFFIRMATIVE DEFENSE (AS TO ALL PLAINTIFFS)**
>
> 98. The Prior Notice exclusion on which plaintiffs rely to deny coverage for the 2016 Warning Notice does not apply because the warning [n]otices arise out of separate Wrongful Acts and each constitute a separate Claim—thus it is

> impossible for HIG to have given notice of the 2016 Warning Notice to a prior insurer as it was not filed until June 2016.

(NYSCEF Doc. No. 364, ¶¶ 97-98).

## II. Discussion

### A. HIG's Motion for Leave to Amend is Denied

Although leave to amend a pleading should be freely given, leave must be denied where the proposed claim or defense is palpably insufficient or devoid of merit (*Leon v Harlan*, 179 Ad3 559, 559 [1st Dept 2020]). Here, as discussed above, the proposed First Amended Answer asserts a "new" affirmative defense based on the doctrine of waiver. The elements of the affirmative defense of waiver under Florida law are: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right" (*Leonardo v State Farm Fire and Cas. Co.*, 675 So 2d 176, 178 [FL 4th DCA 1996]). And, "[t]here can be no waiver unless the party against whom the waiver is invoked was in possession of all the material facts" (*Fireman's Fund Ins. Co. v Vogel*, 195 So 2d 20, 24 [FL 2d DCA 1967])

As a general rule, the doctrine of waiver cannot be asserted to create or extend insurance coverage under Florida law (*Lloyds Underwriters at London v Keystone Equipment Finance Corp.*, 25 So 3d 89, 92 (FL 4th DCA 2009). "The rationale behind the rule is that 'the company should not be required by waiver and estoppel to pay a loss for which it charged no premium'" (*id.,* quoting *Unijax, Inc. v Factory Ins. Assn.*, 328 So 2d 448, 455 (FL 1st DCA 1976). However, "[f]or purposes of application of the doctrines of estoppel and waiver, Florida law

draws a distinction between provisions of forfeiture and provisions of coverage" (*Lloyds Underwriters*, 25 So 2d at 92). Thus, an insurer may waive a right to claim forfeiture resulting from an act or omission of the insured, but the insured cannot assert the doctrine of waiver to create or extend coverage for a loss that was expressly excluded (*id.*). "The distinction between a provision of forfeiture and one of coverage has been said to turn upon whether the loss was covered by the contract in the first instance and is asserted to have been lost or nullified as a consequence of the actions of the insured; if this is the case, then the provision is one of forfeiture (*id.*, citing *Peters v Great Am. Ins. Co., N.Y.*, 177 F 2d 773, 779 [4th Cir 1949]).

HIG argues that leave to amend should be granted because its proposed renewed affirmative defense of waiver is meritorious based on documentary evidence disclosed by Starr approximately two years ago in the course of discovery that was in HIG's possession but not before the court in connection with the 2019 Decision. Specifically, in support of its motion, HIG submits two of Starr's internal underwriting documents. The first document, titled "Starr Indemnity," is an application checklist wherein the word "waived" appears next to the checklist item "Application Warranty" (NYSCEF Doc. No. 354). The second document, titled "Starr Companies Application Waiver," states: "Application waived at underwriter's discretion," and "Reliance conditions not required" (NYSCEF Doc. No. 355). HIG argues that these documents establish that Starr's underwriters knowingly and intentionally waived the right to deny coverage based on any purported misrepresentations made by HIG during the application process. HIG further argues that the Warranty Letter is a forfeiture provision, for which waiver is a valid affirmative defense under Florida law, as opposed to a coverage provision, for which waiver would not be a valid affirmative defense. In addition, HIG argues that it did not delay in moving

to amend, and the amendment would not result in prejudice or surprise to Starr inasmuch as they previously asserted the defense of Waiver albeit based on, among other things, the loss runs that were disclosed pursuant to the Warranty Letter.

In its opposition papers, Starr argues that leave to amend should be denied because (i) the defense of waiver is not applicable under Florida law, (ii) HIG fails to allege additional facts in support of the proposed affirmative defense of waiver sufficient to establish intentional waiver of a known right, and (iii) HIG has had the documents that it purports to rely on in support of the proposed amendment for over two years and its significant delay in moving for leave to amend would be prejudicial to Starr.

As an initial matter, the court notes that HIG's waiver and prior notice arguments were previously dismissed because they were without merit as it relates to the loss for the reasons set forth in the 2019 Decision. In addition, and significantly, HIG's proposed eighth and ninth affirmative defenses set forth in its proposed First Amended Answer both allege that the UK Pensions Regulator's 2014 Warning Notice and 2016 Warning Notice ***arise from separate, unrelated Wrongful Acts and constitute separate claims.*** The problem with these proposed affirmative defenses is that the First Department already expressly rejected those arguments. Specifically, in affirming the April 12, 2018 Order of the Supreme Court (Ramos, J.), which granted the Insurers' motion for summary judgment, the First Department stated that "the notices are deemed to be a 'single Claim' made on 'the earliest date on which any such Claim was first made,' which preceded the inception of the 2016 Policy," and further held that "[c]overage is also barred by the Prior Notice Exclusion" (*Berkshire*, 172 AD3d at 571). To the extent that the

proposed eighth, ninth, and fifteenth affirmative defenses also seek coverage under the 2016 Starr Policy, the First Department has already concluded that, "[t]he unambiguous language of the Related Claims provision and the Prior Notice Exclusion establishes, as a matter of law, that there is no possible factual or legal basis on which plaintiffs may eventually be held liable under the 2016 Policy" (*id.*). Accordingly, the proposed First Amended Answer is palpably improper and fails as a matter of law.

Putting that controlling issue as it relates to the instant motion aside, HIG's nuanced attempt to repackage an argument in favor of waiver as a defense in what more closely approximates a motion to renew its arguments in connection with the 2019 Decision based on two Starr internal documents also fails. A motion to renew must be "based upon new facts not offered on the prior motion that would change the prior determination" and must "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e] [2]; *Orchard Hotel, LLC v D.A.B. Group, LLC*, 114 AD3d 508, 509-510 [1st Dept 2014]). Significantly, the two underwriting documents on which HIG purports to base its new proposed affirmative defenses (NYSCEF Doc. Nos. 354, 355) were produced to HIG in discovery more than two years ago but were not alleged to have been evidence of any agreement between HIG and Starr that was alleged to have existed at the time of the underwriting of the 2014 Policy – i.e., there is no allegation that Starr agreed with HIG to underwrite HIG's exposure without knowing what the exposure was. Simply put, HIG fails to allege sufficient new facts that would change the prior determination or otherwise offer any reasonable explanation as to why it did not present the underwriting documents on the prior motion.

First, it is undeniable that the HIG. supplied the Warranty Letter to Starr and simply failed to disclose the pending investigations and that such Warranty Letter is incorporated into the 2014 Starr Policy pursuant to Section III of the 2014 Starr Policy which provides:

> III. REPRESENTATIONS AND WARRANTIES
>
> It is a condition precedent to the Insurer's obligation under this Policy, and the Insured agrees, that all applications, warranty statements, together with attachments and any other materials submitted for this Policy and the Followed Policy, shall be deemed attached to and made a part of this Policy. The Insurer ***has relied on all such materials, representations and information as being accurate and complete in issuing this Policy.***

(NYSCEF Doc. No. 356 [emphasis added])

In addition, it is simply not clear what these internal documents which were never delivered to HIG when coverage was bound or otherwise relied upon by HIG in deciding to insure with the Insurers mean, and HIG does not allege the existence of any agreement with Starr or other factual allegations that support the inference that these documents mean that there was a ***knowing*** waiver of the disclosure requirement by the Insurers as to what they were insuring – *i.e.*, the whole purpose behind the Warranty Letter, or that they would underwrite HIG's exposure without even knowing what it was (i.e., that Starr knew of the pending investigation and decided to insure the risk). HIG also does not in any way explain why it provided the Warranty Letter if such Warranty Letter was not required and in fact waived – which explanation would in any event be inconsistent with the position taken by HIG in their opposition to the motion in connection with the 2019 Decision when they argued that Starr knowingly assumed the risk based on the loss runs attached to the Warranty Letter. It also appears based on the way that this new defense is written, and given the eighth and ninth affirmative defenses, that HIG. is

again trying to argue waiver as it relates also to the 2016 Starr Policy as well as the 2014 Starr Policy.

Moreover, the Warranty Letter provides the basis upon which coverage is bound, not a forfeiture once coverage was already bound. By arguing that Starr has waived reliance on the Warranty Letter to preclude coverage, HIG seeks to create or extend coverage for a risk that was expressly excluded, *i.e.*, pending claims, including investigations, that were "in the pipeline" at the time of the application. Therefore, under well-established Florida law, the doctrine of waiver is not applicable. To hold otherwise would defeat the purpose of the rule by requiring Starr to pay for a loss that was expressly excluded – *i.e.*, for which a premium was not paid.

To the extent that HIG relies on *Lloyds Underwriters at London v Keystone Equip. Fin. Corp.*, *supra*, for the proposition that warranty letters are provisions of forfeiture, its reliance is misplaced. In *Lloyds Underwriting*, Lloyds denied a claim made by the insured under a policy providing liability coverage on a commercial tractor-trailer, including coverage for loss due to theft, based on a certain Garaging or Secured Yard Warranty (the **Garaging Warranty**), which required the insured to warrant that the tractor trailer would be secured in a closed garage or parked adjacent to the insured's residence (25 So 2d at 91). In affirming the order of the trial court granting the insured's motion for summary judgment, the District Court of Appeal held that the Garaging Warranty was a provision of forfeiture, not of coverage (*id.* at 92). The court reasoned that, "[l]oss due to theft was plainly covered by the policy and a risk for which a premium was paid. The garaging warranty provides for the loss, or forfeiture, of that coverage

should the insured fail to behave in a particular manner and comply with its provisions concerning the storage of the tractor-trailer" (*id.* at 93).

But *Lloyds Underwriting* is factually different, and significantly so, from this case. Whereas in *Lloyds Underwriting*, the risk, *i.e.*, loss due to theft, was expressly covered under the applicable policy, here, coverage for claims (including investigations) that HIG had knowledge of at the time of the application were expressly excluded unless disclosed to Starr by the Warranty Letter. And unlike the Garaging Warranty in *Lloyds Underwriting*, which provided that failure by the insured to properly store the tractor-trailer would result in forfeiture of coverage, the Warranty Letter in this case did not provide for forfeiture upon the occurrence of a future event; it expressly excluded coverage for all pending claims and investigations not disclosed but known by HIG to exist. Put another way, the Warranty Letter goes to whether there was coverage in the first instance as undisclosed items are not covered by its very terms, not whether HIG's ***subsequent conduct*** resulted in a forfeiture of coverage. Accordingly, under Florida law, the application of the failure to disclose known pending investigations in the Warranty Letter does not operate a forfeiture.

In addition, HIG fails to allege facts sufficient to support the inference that Starr voluntarily, knowingly, and intentionally waived its right to deny coverage. HIG places great emphasis on two pages of Starr's internal underwriting documents that make vague reference to a waiver of "Application Warranty," "Application," and "Reliance Conditions." However, HIG fails to allege that such documents were ever provided to HIG much less relied upon by them or that Starr knew of the pending investigation – *i.e.*, that there was a knowing waiver. Accordingly,

HIG's proposed First Amended Answer fails as a matter of law because HIG falls far short of alleging any new facts that suggest that Starr knowingly relinquished its right to rely on the Warranty Letter, which was incorporated into the 2014 Starr Policy, by which HIG agreed to be bound, the unambiguous terms of which expressly exclude coverage (*see Atlantic Nat. Ins. Co. v. Johnson,* 178 So 2d 733, 735-36 [FL 3d DCA 1965] ["We do not believe that an interoffice letter, expressing an opinion of one employee to another, which opinion is never communicated to a third party, or acted on by him, is sufficient to constitute a waiver or estoppel"]). Accordingly, the proposed affirmative defense in the First Amended Answer is palpably improper and insufficient as a matter of law, and HIG's motion for leave to amend is denied.

**B. Starr's Motion to Compel is Granted in Part**

CPLR § 3101 "requires full disclosure of all matter material and necessary in the prosecution or defense of an action." As a guiding principal, "the words 'material and necessary' are 'to be interpreted liberally to require disclosure of . . . any facts bearing on the controversy'" (*Rivera v NYP Holdings Inc.*, 63 AD3d 469, 469 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). A party opposing disclosure bears the burden of establishing that the disclosure sought is improper (*Roman Catholic Church of the Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]).

On October 16, 2019, Starr served the Second Notice on HIG seeking three categories of documents: (1) documents showing communications regarding the regulatory risk of HIG's Silentnight acquisition strategy and documents showing communications regarding the ensuing Pensions Regulator investigation (Request No. 2) (the **Pensions Regulator Documents**), (2)

post-February 2018 documents relating to the Pensions Regulator investigation, including documents regarding exhaustion of the insurance policy limits underlying the 2014 Starr Policy (Request No. 3) (the **Exhaustion Documents**), and (3) documents showing the corporate relationships between and among the insured HIG entities, operating agreements (Request No. 1) (the **Corporate Documents**).

On October 29, 2019, HIG served its Amended Response and Objections to the Second Notice. With respect to the Pensions Regulator Documents, HIG individually logged withheld communications with its UK counsel, Pinsent Masons, pre-dating the issuance of the 2014 Starr Policy, but otherwise declined to individually log any other withheld documents. In addition, with respect to the Exhaustion Documents, HIG agreed to produce "updated and redacted defense invoices," but otherwise objected to producing any other documents, including, specifically, documents showing on whose behalf expenses relating to the UK Pensions Regulator matter had been incurred and paid, on relevance, burden, and privilege grounds. And, as to the Corporate Documents, HIG objected on relevance and burden grounds and declined to produce any additional documents.

*i. The Pensions Regulator Documents*

Under Florida law, where "a party 'has injected into the litigation issues going to the very heart of the litigation,' such party cannot avoid discovery into such issues by invoking the attorney-client privilege" (*First S. Baptist Church of Mandarin, Fla., Inc. v First Nat. Bank of Amarillo*, 610 So 2d 452, 454 [FL 1st DCA 1992], quoting *Home Ins. Co. v Advance Mach. Co.*, 443 So 2d 165, 168 [FL 1st DCA 1983]). An "at issue" waiver of the attorney-client or work product privilege requires:

> (1) an assertion of the protection that results from some affirmative act by the party invoking the protection; (2) the affirmative act must put[ ] the protected information at issue by making it relevant to the case; and (3) application of the protection would deny the opposing party access to information vital to its defense.

(*Sow v James River Ins. Co.*, 2020 WL 1322886, *6 [SD FL, March 20, 2020, 9:19-cv-81065] [internal quotation marks and citation omitted]).

Starr argues that the court should order HIG to produce all outstanding Pensions Regulator Documents because the issues of what HIG knew regarding the pending investigation and when it knew it are the critical issues in this coverage dispute, and because HIG has waived any privilege under the "at issue" waiver doctrine, and that a subset of documents that were clawed back should now be turned over. In its opposition papers, HIG argues that it has already produced all responsive, non-privileged documents, and that it has not waived privilege under the "at issue" waiver doctrine because its defense against Starr's denial of coverage does not require HIG to use privileged communications. HIG further argues that Starr has waived the right to demand the production of the clawed-back documents.

Here, HIG seeks a declaration that the Warranty Letter does not apply to preclude coverage with respect to the UK Pensions Regulator matter. The Warranty Letter expressly excludes coverage for claims and investigations known by HIG that were pending at the time of the execution of the Warranty Letter. By seeking such a declaration and denying that HIG had knowledge of the regulatory risks posed by the Silentnight transaction or the investigation by the UK Pensions Regulator at the time that HIG executed the Warranty Letter, HIG has placed the otherwise privileged information directly at issue. Denying Starr access to HIG's communications with its

attorneys concerning the acquisition of Silentnight and the UK Pensions Regulator matter would deprive Starr of information bearing on the critical issues of this case and severely prejudice its ability to rebut HIG's claim that the Warranty Letter does not apply. In other words, it would permit HIG to use the privilege as both a sword and a shield, a result that the court cannot allow (*QBE Ins. Corp. v Jorda Enters., Inc.*, 286 FRD 661, 664-665 [SD FL 2012]). Accordingly, Starr's motion to compel is granted with respect to the Pensions Regulator Documents.

However, Starr has waived its entitlement to the clawed-back documents. Pursuant to the so-ordered stipulation concerning document production and ESI, any challenge to clawed-back documents was to be brought within 10 days after receiving a claw-back demand (NYSCEF Doc. No. 218, ¶ 6). Here, Starr did not raise its objections to HIG's claw-backs until several months after Starr served its claw-back demands. Accordingly, Starr failed to comply with the so-order stipulation and is barred from now challenging the claw-backs.

*ii. The Exhaustion Documents*

Starr argues that it is entitled to disclosure of all documents relating to the payment of claims on the underlying policies to determine whether HIG has exhausted the underlying policy limits. HIG argues that to the extent that such documents were created after this suit was filed they remain privileged, and that the information sought is not relevant.

Because the 2014 Starr Policy is an excess policy, its coverage is not triggered until the underlying policy limits of $20 million are exhausted by the payment of covered claims. Significantly, Silentnight is not an insured under the 2014 Starr Policy, so its defense costs would not exhaust the underlying policies. But HIG's counsel in connection with the UK

Pensions Regulator matter also represents Silentnight, and discovery has shown that HIG has allocated the defense costs between Silentnight and the insured HIG entities. Thus, it is critical that Starr have disclosure of documents sufficient to show how such costs have been allocated in order to know whether the vertical exhaustion requirements of the underlying claims have been satisfied. If they have not, the 2014 Starr Policy has not yet been triggered.

To the extent that HIG asserts that certain time entries contain attorney work product and are therefore privileged, by raising the issue of the applicability of the 2014 Starr Policy, HIG has necessarily put the exhaustion of the aggregate policy limits of the underlying policies at issue, and has therefore waived work-product privilege as it relates to documents bearing on the allocation of coverage (*Maplewood Partners, L.P. v Indian Harbor Ins. Co.*, 2011 WL 3918597, *8-9 [SD FL, Sept. 6, 2011, No. 08–23343–CIV]). Accordingly, Starr's motion to compel is granted with respect to the Exhaustion Documents.

*iii. The Corporate Documents*

Starr argues that it is entitled to the Corporate Documents as they are material and necessary to its claims. Specifically, Starr argues that if HIG intends to challenge whether any individuals with knowledge of the Silentnight acquisition strategy or UK Pensions Regulator matter meet the terms of the Warranty Letter, HIG should be required to produce documents showing the roles that such individuals played within the HIG entities. HIG argues that Starr's request is unduly burdensome and should be denied. It argues that all relevant and responsive documents have already been produced and, indeed, reproduced.

Here, HIG has demonstrated that it searched for, located, and produced all documents responsive to Starr's request for Corporate Documents using the search terms provided by Starr, totaling 8,202 documents. In addition, information regarding the corporate structure of the HIG entities was produced in the UK Pensions Regulator matter and reproduced by HIG in this case. And, the responses produced by the targets of the UK Pensions Regulator's investigation, which include additional information on the corporate structures and connections between the targets and the HIG entities, have also been reproduced by HIG in his case. It is not clear what additional responsive documents Starr believes exist that HIG has yet to turn over, but based on the foregoing, HIG has made a good faith effort to make a full production of all responsive documents in its possession and control and any further requests regarding the Corporate Documents would be unduly burdensome. Therefore, Starr's motion to compel is denied with respect to the Corporate Documents.

Accordingly, it is

ORDERED that HIG's motion for leave to amend its answer (Mtn. Seq. No. 012) is denied; and it is further

ORDERED that Starr's motion to compel (Mtn. Seq. No. 013) is granted in part, and HIG shall produce to Starr, within 60 days of the date of this decision and order, the following

documents responsive to Starr's Second Notice of Discovery and Inspection, excluding any of the clawed-back documents, as set forth above:

- Documents showing communications regarding the regulatory risk of HIG's Silentnight acquisition strategy and documents showing communications regarding the ensuing Pensions Regulator investigation (Request No. 2) (the Pensions Regulator Documents); and
- Post-February 2018 documents relating to the Pensions Regulator investigation, including documents regarding exhaustion of the insurance policy limits underlying the 2014 Starr Policy (Request No. 3) (the Exhaustion Documents).

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5/27/2020
DATE

ANDREW BORROK, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |